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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1967**

No. **911**

NANTAHALA POWER AND LIGHT COMPANY,
*Petitioner,*

*v.*

FEDERAL POWER COMMISSION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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December 13, 1967

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FEDERAL POWER COMMISSION,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Nantahala Power and Light Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on September 14, 1967.

### Opinions Below

The opinion of the Court of Appeals below is not yet reported. It is printed in Appendix A hereto, pages 1a-27a. The Declaratory Order of the Federal Power Commission (hereinafter "FPC" or "Commission"), requiring the Petitioner to obtain licenses is reported at 36 F.P.C. 119 (1966) and is filed with this petition as Appendix C hereto, pp. 1c-14c.

## Jurisdiction

The judgment of the Court of Appeals was entered on September 14, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), and Section 313(b) of the Federal Power Act.*

## Questions Presented

Between 1940 and 1949, Petitioner, pursuant to §23(b) of the Federal Power Act** filed Declarations of Intention to construct hydroelectric facilities in non-navigable waters over which Congress has jurisdiction under its authority to regulate interstate commerce. The Federal Power Commission in each instance, exercising its investigatory function under that Section, found that the interests of interstate and foreign commerce would not be affected. Section 23(b) provides that if such finding is made, "permission is hereby granted to construct such dam * * * upon compliance with State laws." This permission provided specific statutory authorization by Congress for the construction of petitioner's developments. The questions presented are:

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* 49 Stat. 860 (1935), 16 U.S.C. §8251(b) (1964).

** 41 Stat. 1075 (1920), as amended, 49 Stat. 846 (1935); 16 U.S.C. §817 (1964). Section 23(b) provides in relevant part that anyone intending to construct a dam in a non-navigable stream over which Congress has jurisdiction shall, "before such construction", file a declaration of intention with the Commission. The Commission must then investigate the proposed construction. If it finds the "interests of interstate or foreign commerce would be affected by such proposed construction" a license must be obtained. However,

> "If the Commission shall not so find, and if no public lands or reservations are affected, *permission is hereby granted* to construct such dam or other project works in such stream upon compliance with State laws." (Emphasis supplied.)

(1) May the Federal Power Commission, without further action by Congress, now revoke the permission granted by Congress in §23(b) and require licenses to be obtained for projects constructed under such permission, on the sole ground that the Commission's earlier findings were made in ignorance of its jurisdiction as later established by the *Taum Sauk* case (*Federal Power Commission* v. *Union Electric Co.*, 381 U. S. 90 (1965))?

(2) When there is no navigational servitude, public lands or other property interest of the United States involved, may the Federal Government, despite the prohibition in the Fifth Amendment against the taking of private property for public use without just compensation, require an owner of a facility to agree to ultimately surrender the facility for less than just compensation as a condition to continuing to use the facility in interstate commerce?

(3) Does the Constitutional question (question (2), *supra*) present an issue which should be adjudicated before Petitioner is required to either (1) discontinue maintenance and operation of its facilities, or (2) accept a license agreeing to future surrender of its facilities for less than just compensation, or must Petitioner wait for the government to take its property before obtaining a judicial determination of its rights to just compensation?

## Statutes Involved

The statutory provisions involved are all contained in the Federal Power Act, to wit:

Section 3(13), 41 Stat. 1063, as amended 49 Stat. 838; 16 U.S.C. §796;
Section 4(g), 49 Stat. 839, 16 U.S.C. §797;

Section 6, 41 Stat. 1067 as amended 49 Stat. 841, 16 U.S.C. §799;
Section 10(a), 41 Stat. 1068, 16 U.S.C. §803;
Section 14, 41 Stat. 1071 as amended 49 Stat. 844, 16 U.S.C. §807;
Section 15, 41 Stat. 1072, 16 U.S.C. §808;
Section 23(b), 41 Stat. 1075 as amended 49 Stat. 846, 16 U.S.C. §817;

and the Fifth Amendment to the Constitution of the United States. Statutory provisions are set forth in Appendix B hereto.

## Statement

Between 1940 and 1949, Petitioner Nantahala Power and Light Company ("Nantahala") filed with the FPC Declarations of Intention to construct seven hydroelectric developments, with aggregate installed capacity of 102,615 kilowatts, in North Carolina on non-navigable (App. C, p. 2c) tributaries of the Little Tennessee River. As to each development, the Commission, exercising the investigatory function delegated to it by Congress under Section 23(b), found that there would be no effect on interstate or foreign commerce (App. C, pp. 3c-4c). Thereupon, Nantahala proceeded to construct each such project in accordance with the Congressional permission (no different in effect from that provided by special act) granted by Section 23(b) of the Federal Power Act (App. B, pp. 4b-5b). The last such development was completed in 1955 (App. C, p. 3c).

Nantahala constructed its projects in reliance upon and pursuant to the permission of Congress in Section 23(b). In 1940, the same year in which Nantahala obtained permission to construct its Thorpe and Nantahala plants without licenses, it filed a Declaration of Intention to con-

struct the Fontana project, on the Little Tennessee River. The Commission found that this project would affect the interests of interstate commerce, and that therefore a license would be required. Nantahala thereupon decided not to construct the project, and subsequently all the lands and rights were transferred to the Tennessee Valley Authority ("TVA"). It is fairly to be inferred that Nantahala, had it been informed that licenses would be required for the headwater projects involved in this case, would have decided not to build such projects rather than accept the heavy burdens imposed by licenses.

All of Nantahala's generating and transmission facilities are located within the State of North Carolina. Under agreements with TVA, that agency controls and directs the generation at, and the transmission of energy from, all of the Nantahala developments including the amounts and precise routing of the power on the line (App. C, p. 2c). Some of this power may be transmitted outside of North Carolina.

On July 13, 1965, following the decision of this Court in *Federal Power Commission* v. *Union Electric Co.*, 381 U. S. 90 (May 3, 1965) the FPC sent to Petitioner (among others) a letter (Joint Appendix, "JA" 1-2) which for the first time intimated that licenses might be required for these developments. On November 29, 1965, Nantahala filed with the Commission an application for a declaratory order that no licenses were required for these developments (JA 3-25). On July 18, 1966 the Commission issued a declaratory order that licenses were required (App. C, pp. 1c-14c).

Such order accepted the fact that the developments in question are neither located on navigable waters of the United States nor affect downstream navigable capacity

(App. C, p. 2c), and the order is based wholly upon the fact that some of the power produced may enter interstate commerce (App. C, pp. 3c-5c). There was no claim that the earlier Commission findings which had preceded construction were not based on a full and factually correct record, nor was there any claim of a significant change in factual circumstances from those upon which the prior findings were premised.* Nantahala's petition for rehearing (JA 41-47) was filed August 16, 1966 and denied by the FPC by order issued September 6, 1966 (App. C, p. 15c.

Nantahala sought review of such order pursuant to Section 313(b) of the Federal Power Act by petition to the Court of Appeals for the Fourth Circuit on November 4, 1966. In such petition, Nantahala objected to the declaratory order of the Commission on the grounds, *inter alia,* that (1) since the developments were constructed pursuant to the Congressional authorization contained in Section 23(b) of the Act, the Commission was without authority to now require licenses for them in derogation of such Congressional authorization; and (2) the requirement of licenses for these developments, carrying with it the provisions of Section 14 of the Federal Power Act allowing their takeover by the United States at less than fair value, would deprive Petitioner of its property in violation of the Fifth Amendment.

By opinion and order of September 14, 1967, the Court below rejected these contentions and ordered the Commission's order enforced. The Court (1) held that notwithstanding the Congressional permission granted by

* The order states (App. C, pp. 2c, 13c-14c) that it is based upon the facts stated in Nantahala's November 29, 1965 petition, which demonstrates no significant change in factual circumstances.

Section 23(b) to construct, maintain and operate a project upon a Commission finding of no effect on commerce, the Commission can at any time after construction, if it finds an effect on commerce, require a license as a condition to continued operation and maintenance of the project (App. A, p. 10a), and (2) refused to consider the Fifth Amendment contention on the ground that the issue was not yet ripe for decision (App. A, pp. 22a-23a).

## Reasons for Granting the Writ

The decision below creates fundamental questions of statutory and constitutional interpretation not previously decided by this Court. It raises serious doubts not only as to the meaning of a major provision of the Federal Power Act, but as to the scope, both substantive and procedural, of Fifth Amendment protection of property rights. It involves a conflict between a decision of this Court,* and the decision of the Fourth Circuit,** as well as a conflict between the Fourth and First Circuit Courts.*** The impact of the decision below, if permitted to stand, will be felt not only by Petitioner and other project owners similarly situated, but also by those who may in the future undertake construction of projects like *Taum Sauk,* where the Commission's licensing jurisdiction rests only upon the movement of electric energy in interstate commerce.

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* *U. S.* v. *Appalachian Power Co.*, 311 U. S. 377 (1940).

** See decision below, App. A.

*** *Rumford Falls Power Co.* v. *F.P.C.*, 355 F. 2d 683 (1st Cir. 1966).

## I.

**Two important questions of Federal law which have not been, but should be, settled by this Court are presented.**

**A. Congress having granted Nantahala permission under §23(b) of the Act to construct and operate hydroelectric developments, may the FPC now require licenses in contravention of such Congressional permission?**

The legislative history of the Federal Power Act makes clear that one of the principal purposes of the Act as a whole, and Section 23(b) in particular, was to encourage development of water power.* One means of encouraging such development was by providing potential investors with certainty as to their rights.** The decision below defeats this aim.

Its exposition of the rights of a party which lawfully built a project under permission granted by the last sentence of Section 23(b)*** is so at variance with the prior interpretation of the Act by the Commission itself as to create grave doubts as to the state of the law. These

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* *F.P.C.* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 251 (1953); *First Iowa Hydro-electric Coop.* v. *F.P.C.*, 328 U. S. 152, 180 (1946).

** See, e.g. S. Rept. No. 179, 65th Cong., 2nd Sess. pp. 1-2 (1917); Final Report of the National Waterways Commission, Sen. Doc. No. 469, 62nd Cong. 2nd Sess., pp. 38-39 (1912); 53 Cong. Rec. Appendix 1303 (1916); 56 Cong. Rec. 9282 (1918); 58 Cong. Rec. 1939 (1919). In 1927, the Chief Counsel for the Commission, in an Opinion to the Executive Secretary of the Commission, noted the purposes of Section 23 were to protect navigation and "to protect applicants by providing a means whereby they can have an authoritative ruling before investment is made." F.P.C. Seventh Annual Report, 149, 155 (1927).

*** Hereinafter referred to as a "permitted project".

doubts create the very uncertainties as to rights of investors which the Act was intended to dispel. Further, under the decision below, the owner's rights to obtain any benefit from the project are rendered defeasible by events beyond his control, thereby destroying the reasonable certainty of rights necessary for investment.

In the opinion of the Court below, the obtaining of a finding that there is no effect on interstate commerce protects the owner of a project for that day only, for according to the opinion below whenever

> "the Commission determines that a change in the underlying facts, or a correct exposition of the applicable law, discloses that the facility does affect commerce, continued maintenance and operation is conditioned upon the procurement of a license." (App. A, p. 10a.)

Nothing in the Court's opinion precludes a determination of the "correct exposition of the applicable law" from being made the day after the project's completion or even during construction. Since effect on interstate commerce is a mixed question of law and fact which is not susceptible of determination by the application of fixed objective standards, even a change in the composition of the Commission could lead to a decision which at a minimum could reduce the value of the project if a license were required and at a maximum, if a license were denied, could completely destroy its value. Under these conditions, funding of such projects would become difficult if not impossible.

The lower Court's holding, that §23(b) provides only temporary protection for the investor until such time as the Commission decides a license is necessary, runs directly counter to the certainty that the Act as a whole was intended to create, and is inconsistent with the established

historic interpretation of that section by the Commission and its representatives.

The last sentence of Section 23(b), providing Congressional permission to construct without a license, was taken unaltered from the prior Act. This statutory provision has remained unchanged for more than 46 years; and it was not until 45 years after its enactment that the Commission in this proceeding first claimed that it could revoke such Congressional permission. Heretofore the Commission has expressed an understanding of the statutory language entirely consistent with petitioner's position in this proceeding and contrary to the interpretation given by the Court below.

In the First Annual Report of the Federal Power Commission, published in 1921, the Commission stated:

> "If the Commission finds that the interests of interstate or foreign commerce are not affected, the act grants authority to proceed in compliance with State law, *and the declarant is freed from any subsequent liability to the United States under any existing or future acts of Congress regardless of conditions that may thereafter arise* • • •. It is only when a declaration [of intention] is filed and a decision rendered in the manner prescribed in the act that the finding of the Commission becomes conclusive and binding both upon the declarant and upon the United States" (p. 54). (Emphasis supplied.)

In 1921, under the Federal Water Power Act of 1920, the filing of a Declaration of Intention was optional. The Commission contrasted the certainty inherent in a Commission finding of no effect upon interstate commerce, after filing of a Declaration of Intention, with the risks involved in failing to file a Declaration of Intention. It

observed that a development constructed without a Commission finding of no effect could be subject to severe penalties if "through change of conditions a commerce should develop in the future of which there is no apparent possibility at the time construction is made" (p. 53).

In 1927, the Chief Counsel for the Commission, in an Opinion to the Executive Secretary of the Commission, stated:

> "The paragraph [Section 23] above quoted has two purposes in view: (1) To protect the interests of navigation * * * (2) to protect applicants by providing a means whereby they can have *an authoritative ruling before investment is made.*" F.P.C. Seventh Annual Report, 149, 155 (1927) (Emphasis supplied.)

In 1935, the Federal Water Power Act was made Part I of the Federal Power Act. Section 23 of the original act became part of Section 23(b) of the Federal Power Act. The filing of Declarations of Intention was made mandatory. Otherwise there was essentially no change in the provisions of Section 23. Mr. Dozier DeVane, the Solicitor of the Commission speaking for the Commission, stated in Congressional hearings on the amendments with respect to Section 23:

> "The effect of section 23 is to permit a proper determination in advance of the construction of the project as to whether or not it will affect interstate and foreign commerce. That determination having been made, a license is required or it is not required under the act according to the facts that are shown. If it is a fact that interstate or foreign commerce will not be affected the construction work can be done, without a license. If the facts show that interstate or foreign commerce will be affected

> the construction work cannot be done without a license." Hearings before House Interstate & Foreign Commerce Committee on H.R. 5423, 74th Cong., 1st Sess. at 472 (1935).

In 1947 the Commission's General Counsel, appearing for the Commission, testified before a Congressional Subcommittee that

> "The Commission cannot reserve jurisdiction under the Federal Power Act. If they find the proposed development does not affect interstate commerce, it cannot reserve jurisdiction." Hearings on H.R. 2972 before the Subcommittee of the House Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess. 443 (1947).

The foregoing statements of the Commission and its counsel show that Congress intended, and the Commission understood, that certainty as to the future status of a proposed development was a primary consideration in the enactment of the last two sentences of Section 23(b) and its predecessor, Section 23.

The opinion below for the first time casts uncertainty on the rights of the owner of permitted projects. It is petitioner's belief that in the future no investor will undergo the risk of complete loss of value* imposed by such decision, if such opinion is held to be a correct exposition of the law.

Not only does the decision below render a project builder's rights completely defeasible by a mere change of policy on the part of the Commission but, in addition,

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* The question is not merely one of whether a license must be obtained. If the decision below is correct, nothing precludes the Commission from finding that a permitted project fails to meet the requirements of Section 10(a) of the Act, and therefore cannot be licensed or from ordering a license under conditions so onerous as to destroy the value of the project.

under the *Taum Sauk* doctrine, events unrelated to Commission policy and completely beyond the control of a project owner could render his project subject to the licensing requirements of the Act, and could jeopardize a huge investment.

If, for example, a project feeds power solely to an intra-state utility with no interstate interconnections, and there is no effect on navigability, the requisite Commission finding could presumably be obtained, and the project built without a license under the permission granted by Section 23(b). Thereafter, if the purchasing utility (not necessarily under the project owner's control) made interstate interconnection, under the doctrine of the Court below the project owner could no longer maintain the project (although its operation would not change in any way) unless the Commission could find that a license was appropriate under Section 10(a) of the Act (*Jersey Central Power & Light Co.* v. *F.P.C.*, 319 U. S. 61, (1943)).

It is submitted that Congress would never have been so unrealistic as to suppose that money would be invested, and resources developed, under these conditions. Indeed, the decision below renders the Declaration of Intention provisions of Section 23(b) virtually meaningless.

Certainly, the grave questions created by the opinion below should be resolved by this Court so that prospective investors, as well as owners of existing projects, can know authoritatively what their rights are.

**B. May the Federal Government, in the absence of any navigation servitude or property right of the United States and solely in the exercise of its commerce power, take the property of Nantahala without paying just compensation by requiring acceptance of a license, providing for takeover of Nantahala's projects for less than just compensation, as a condition to permitting their continued maintenance and operation?**

The constitutionality of Section 14 of the Act, which provides for takeover of the project at the end of the license term, is founded, under the doctrine of *U. S.* v. *Appalachian Power Co.*, 311 U. S. 377 (1940), upon the existence of a Federal servitude for navigation in navigable waterways.* The Federal government is under no duty to make these property rights available to any individual. It can impose such conditions on their use as it sees fit. The agreement by an applicant to turn over the facilities constructed, after a stipulated period and at a price to be determined by a stipulated formula, is in that context an appropriate condition.

In the instant case, and in every other case where FPC licensing jurisdiction is founded on the *Taum Sauk* doctrine, there is no navigational servitude or federal property right involved. The federal jurisdiction to license petitioner's developments is founded solely upon the effect on interstate commerce resulting from the transport of the electricity produced, and not upon the basis of effect on navigable capacity. Indeed, the Federal jurisdiction over petitioner's plants has no stronger foundation than that which underlies its power over a tomato cannery, or any comparable manufacturing enterprise, shipping its

* Or in certain instances, it is based upon the licensee's use of other federal property rights not involved here.

goods in interstate commerce. It is obvious that, as a matter of constitutional law, the Federal Government does not have the power to take over the tomato cannery without paying just compensation. In like manner, it does not have the power to take over petitioner's plants without the payment of just compensation.

There is no question but that in either case, the case of the tomato cannery, or petitioner's projects, Congress has the power to *regulate* the interstate activities in question. However, any *prohibition* against interstate commerce in either cans of tomatoes or electricity could only be made if Congress found such activities would be injurious to public health, morals or welfare. See *United States* v. *Darby,* 312 U. S. 100, 114 (1941). It has never been held or intimated that the government could refuse to allow the tomato canner to engage in interstate commerce unless he agreed to waive his constitutional right to just compensation. This, however, is precisely what the Federal Power Commission has done by holding that Petitioner could not continue to operate its plants without waiving its constitutional right to just compensation, i.e., without accepting a license providing for recapture at less than fair value. The Court below did not decide the issue but held that the constitutional question was not justiciable at this time.

The Commission's declaratory order states quite clearly the intent to apply the requirements of Section 14 to Petitioner's projects (App. C, p. 12c). Under that section, Petitioner is required to surrender the projects upon the termination of the license for "net investment" plus severance damages. Net investment is defined by Section 3(13) of the Act to refer to original cost with certain adjustments. It is by its terms a bookkeeping figure which bears

no relation to fair market value. Section 14 itself specifically provides that only in the event of condemnation, as distinguished from takeover, just compensation must be paid. (See *United States* v. *Appalachian Power Co., supra,* at 427 (1940)). There can be no question that in accepting a license, including "acceptance by the licensee of all the terms and conditions of this Act * * *" (Section 6), a licensee is waiving the constitutional right of "just compensation" under the Fifth Amendment.

Furthermore, this Court also recognized the distinction which Petitioner now asserts between the federal right to impose such a condition where the navigational servitude is involved, and the right where there is merely regulation of interstate commerce. In *United States* v. *Kansas City Life Ins. Co.,* 339 U. S. 799 (1950), the Court said:

> "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power, and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation." 339 U. S. at 808.

Finally, although the property rights of every existing or future owner of a hydroelectric project licensable only by virtue of the *Taum Sauk* doctrine are at issue in this proceeding, an even broader question is raised. This issue is the extent of the power of the Federal Government acting under the commerce clause to effectively nullify the Fifth Amendment provisions for just compensation.

## II.

**The Court below has decided a Federal question in conflict with an applicable decision of this Court, and in conflict with the decision of another Court of Appeals on the same matter.**

**A. Is Petitioner entitled to have the constitutional issue (Point I B) judicially determined before Petitioner is required to decide whether to accept a license containing a waiver of petitioner's right to just compensation?**

The Court below dismissed petitioner's arguments on the constitutional issue (I(B) *supra*) with the statement that they were not "ripe for decision" (App. A p. 23a). Petitioner submits that the Fourth Circuit's decision is contrary to logic and economic realities, and specifically contrary to this Court's decision in *Appalachian Electric Power* case, *supra,* and to the decision of the First Circuit in *Rumford Falls Power Co.* v. *FPC, supra.*

Even assuming, as the Court below apparently does (App. A p. 22a), that licenses will be granted which "will not expire for a number of years"* there is obviously a present burden upon the petitioner's property rights in the project. It is the difference between owning property in fee simple absolute, and holding property which is subject to an option at a set price below fair market value. Furthermore, if petitioner's projects are subject to licensing jurisdiction as the lower Court held, the Petitioner is faced with the immediate decision whether to accept any license proffered, with the Section 6 waiver of any objec-

* There is no basis in the Act, or in the Commission's declaratory order, for such an assumption; indeed the Act sets no standard to determine the term of license on a permitted project if, indeed, the Commission finds a license to be appropriate.

tion to the terms of the Act, or cease maintenance and operation of the projects. In view of these circumstances there is no basis whatever for the Fourth Circuit's conclusion that the Constitutional question is not ripe for decision.

This Court took cognizance of the immediate burden placed upon a project owner in these circumstances in *United States* v. *Appalachian Power Co., supra,* where the precise issue of the timeliness of a challenge to the Constitutionality of Section 14 was raised. The government contended, as does the Court below, that consideration of the validity of Section 14 and the license conditions based upon its language should be deferred until the government undertook to take over the project at the end of the license term. The Court disposed of such contention, stating at 311 U. S. 421:

> "Assuming that the mere acceptance of a license would not later bar the objection of unconstitutional conditions, even when accompanied by a specific agreement to abide by the statute and license, we conclude that here the requirements of §14 so vitally affect the establishment and financing of respondent's project as to require a determination of their validity * * *".

The First Circuit Court of Appeals has also recognized that there must be a prior right to adjudicate the propriety of license conditions tendered to an applicant, even where there is no immediate threat by the government to exercise rights under those conditions. It dismissed a Commission claim that the appeal was premature with the comment that, "Rarely have we seen a more specious contention". *Rumford Falls Power Co.* v. *Federal Power Commission, supra,* at 688.

The writ of certiorari sought should appropriately issue to resolve this conflict between the Fourth and First Circuits and between the Fourth Circuit and the decision of this Court in the *Appalachian Power Co.* case, *supra*, as to the timeliness of appeal from license conditions imposed under the Federal Power Act and similar statutes.

## CONCLUSION

**For the foregoing reasons this petition for a writ of certiorari should be granted.**

Respectfully submitted,

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